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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92063729
Party	Defendant Apple Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Registration of Apple Inc.
Mark: FRONT ROW
Registration No.: 3,411,726

UBIQUITI NETWORKS, INC.,	:	
	:	
Petitioner,	:	
	:	
v.	:	Cancellation No. 92063729
	:	
APPLE INC.,	:	
	:	
Registrant.	:	

REGISTRANT’S MOTION TO DISMISS

Registrant Apple Inc. (“Apple”), by its attorneys, moves to dismiss the Petition to Cancel filed by Petitioner Ubiquiti Networks, Inc. (“Petitioner”), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on grounds that the petition fails to state a claim upon which relief may be granted.

INTRODUCTION

Petitioner is seeking to cancel Apple’s Registration No. 3,411,726 of the mark FRONT ROW (the “Registration”).

Since 2005, Apple has continuously used the mark FRONT ROW in commerce in connection with the goods identified in the Registration, computer software for controlling the operation of audio and video devices. Specifically, Apple’s FRONT ROW software is included as part of its OS X 10.6 Snow Leopard operating system software, which is currently available for download on Apple’s website. Apple also currently supplies technical support materials for the FRONT ROW software on its website.

The Petition for Cancellation inaccurately alleges that Apple discontinued its use of the FRONT ROW mark in July 2011, that the mark was not in use when Apple filed its Combined Declaration of Use and Incontestability under Sections 8 & 15 for the Registration in June 2013, that the Registration was maintained by allegedly fraudulent statements, and that the mark has been abandoned.

Petitioner also seeks to cancel the Registration on the grounds of fraud in the original application with respect to certain goods (remote controllers for audio devices, video devices and personal computers), but Apple's original specimens of use show that its FRONT ROW mark was in fact used in connection with such goods.

Petitioner provides no documentation to support its allegations, and cites no facts, except to say that Apple in July 2011 released a version of its operating system known as OS X Lion v. 10.7 and software known as iTunes v. 10.4. Its bare bone allegations amount to nothing more than recitations of the elements of its causes of action, which are insufficient to satisfy even the minimal notice pleading standards of the Federal Rules of Civil Procedure, much less the heightened pleading standards applicable to fraud claims. As such, Apple respectfully requests that the Petition be dismissed in its entirety.

ARGUMENT

I. Legal Standard

A motion to dismiss under Rule 12(b)(6) is a test of the sufficiency of a complaint. *See* TBMP § 503.02. To survive such a motion, a plaintiff need only allege sufficient factual matter as would, if proved, establish that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing or cancelling the mark. *See Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); TBMP § 503.02. In determining a motion

to dismiss, all of the plaintiff's well-pleaded, material allegations are accepted as true and construed in favor of the pleading party. *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1027 (Fed. Cir. 1999). However, the plaintiff must allege more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." TBMP § 503.02. The Board is not required to accept as true legal conclusions or unwarranted factual inferences. *Nsm Res. Corp. and Huck Doll LLC v. Microsoft Corp.*, 113 USPQ2d 1029 (TTAB 2013) (citing *In re Bill of Lading Transmission and Processing System Patent Litig.*, 681 F.3d 1323, 103 USPQ2d 1045, 1051 (Fed. Cir. 2012)).

Fed. R. Civ. P. 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." However, the Rule requires more than labels, conclusions, formulaic recitations of the elements of a cause of action and hollow assertions. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Furthermore, fraud claims are subject to the heightened pleading standard of Rule 9(b), which provides that "a party must state with particularity the circumstances constituting fraud or mistake." As the Federal Circuit explained, "[t]his means the who, what, when, where, and how' of the alleged fraud." *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1327, 91 USPQ2d 1656 (Fed. Cir. 2009). Allegations of fraud based solely on "information and belief" raise only the mere possibility that evidence of fraud may be uncovered, and "do not constitute pleading with fraud with particularity." *Asian & W. Classics B.V. v. Selkow*, 92 USPQ2d 1478, 2009 WL 3678263 (TTAB 2009); *see Exergen*, 575 F.3d at 1330 (allegations based upon information and belief without any allegation of "specific facts upon which the belief is reasonably based" are insufficient).

II. Petitioner's Fraud Allegations Lack the Requisite Particularity

Fraud on the USPTO occurs when a party **knowingly** makes a **false, material** representation of fact, with the willful **intent to deceive** the USPTO in connection with procuring or maintaining a trademark registration. *See In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009). Here, Petitioner seeks to cancel Apple's Registration on grounds of fraud based on the bare recitation of some, but not all of the elements of a cause of action for fraud, and non-specific, conclusory allegations made "upon information and belief" regarding statements made by Apple in applying for and maintaining the Registration.

Petitioner alleges that Apple's February 22, 2006 application for the FRONT ROW mark (Application Serial No. 79/821,120), and June 4, 2013 Combined Declaration of Use and Incontestability under Sections 8 & 15 submitted to maintain the Registration contained false statements. With respect to the facts and circumstances of Apple's application to register FRONT ROW, Petitioner has alleged only that:

- "Upon information and belief Registrant never advertised, distributed or sold '*remote controllers for audio devices, video devices and personal computers*' under the FRONT ROW mark. Instead the FRONT ROW mark was used exclusively in connection with software. Nevertheless, Registrant asserted that the mark was in use with all of the listed goods 'at least as early as' October 12, 2005." (Petition ¶ 6); and
- "Upon information and belief Registrant's false statement regarding Registrant's use of the FRONT ROW mark in connection with '*remote controllers for audio devices, video devices and personal computers*' was made in full knowledge of its falsity and was made with the intent to deceive the USPTO. Accordingly, App. Ser. No. 78/821,120 was void *ab initio*, and no registration should have issued therefrom." (Petition ¶ 7).

The only allegations supporting Petitioner's assertions that the Section 8 & 15 Declaration contained false statements are that:

- "Upon information and belief Registrant discontinued use of the FRONT ROW trademark in July of 2011 with the release of Registrant's OS X Lion v. 10.7 operating system and iTunes v. 10.4 software." (Petition ¶ 10);

- “Upon information and belief Registrant discontinued support for Registrant’s FRONT ROW software in July of 2011 with the release of its OS X Lion v. 10.7 operating system and iTunes v. 10.4 software.” (Petition ¶ 11); and
- “Upon information and belief, Registrant’s FRONT ROW mark had not been used in commerce by Registrant since 2011, and was not in use in commerce on June 4, 2013 when the Sections 8 & 15 Declaration was filed. (*See Exhibit 3*).” (Petition ¶ 15).

Petitioner’s allegations fall far short of satisfying the particularity requirement of Rule 9(b). First, Petitioner failed to allege that the falsity of any of Apple’s statements was **material** to the PTO’s decision to issue the Registration. Second, Petitioner did not allege specify which of Apple’s statements were false or which were made with intent to deceive. Moreover, Petitioner has not alleged any specific facts to support its conclusions – **all** of which are based on “information and belief”. These deficiencies render Petitioner’s fraud claims defective as a matter of law. *See Asian & W. Classics*, 92 USPQ2d at 1478 (“[T]o satisfy Rule 9(b), any allegations based on ‘information and belief’ must be accompanied by a statement of facts upon which the belief is founded.”); *Nsm Res. Corp. and Huck Doll LLC*, 113 USPQ2d 1029 (dismissing fraud claims based on “information and belief”); *Exergen Corp.*, 575 F.3d at 1330 (holding that a pleading must set forth specific facts upon which the belief of fraud is reasonably based).

III. Petitioner’s Abandonment Allegations are Deficient

Petitioner’s allegations to support its abandonment claim consists of only the following paragraph:

“Upon information and belief Registrant has not used its FRONT ROW mark since July of 2011 and has no intention to resume use of its mark in connection with the goods remaining in Reg. No. 3,411,726. (*See Exhibit 3*).” (Petition ¶ 19).

This allegation is no more than a flat recitation of the elements of a cause of action for abandonment. As such, it fails to provide fair and adequate notice of the grounds upon which

Petitioner's claim rests and, therefore, it is insufficient to meet even the minimal notice pleading standards of Rule 8(a)(2). *See Twombly*, 550 U.S. at 555 (holding that a plaintiff's pleading obligation "requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.").

Additionally, Petitioner's allegations based on information and belief are not reasonable or plausible in light of the documentary evidence it has relied upon, namely, Exhibit 3 to the Petition. That Exhibit is a February 26, 2011 article from a third party website regarding Apple's announcement of an update to the iMac operating system, namely, OS X 10.7 Lion. While the article indicates that Apple's FRONT ROW software is not included in the OS X Lion operating system, it does not in any way state that Apple has discontinued use of FRONT ROW or that the previous operating system (OS X 10.6 Snow Leopard) would be unavailable. Indeed, if Petitioner had conducted even a minimal amount of investigation prior to filing the Petition, it could have determined that Apple continues to offer the Snow Leopard operating system and FRONT ROW software support materials (*see, e.g.*, <http://www.apple.com/shop/product/MC573Z/A/mac-os-x-106-snow-leopard>; https://support.apple.com/kb/SP575?viewlocale=en_US&locale=en_US), and has done so continuously since 2005.

IV. Apple's Valid and Timely Section 8 & 15 Declaration was Accepted by the PTO

The Petition includes an unexplained "allegation" requesting cancellation of the Registration on the alternative ground that "no valid Section 8 Declaration was filed during the requisite time period." (Petition ¶ 18). To the extent that this "allegation" can be understood, Petitioner appears to suggest that Apple's combined Section 8 & 15 Declaration was untimely.

However, Petitioner has attached PTO records relating to the Registration which plainly show that Apple timely submitted a Combined Section 8 & 15 Declaration on June 4, 2013, and the PTO accepted it on June 17, 2013 (*See* Petition, Exhibit 2). Petitioner offers no facts or authority that would support the Board's overturning of the PTO's decision to accept the declaration. Accordingly, the "allegation" set forth in Paragraph 18 of the Petition should be dismissed because it is wholly undermined by documentary evidence that has been submitted and relied upon by Petitioner itself.

CONCLUSION

For the foregoing reasons, Apple requests that the Petition be dismissed with prejudice in its entirety.

Respectfully submitted,

Dated: July 26, 2016

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Certificate of Service

I hereby certify that on July 26, 2016, a true and correct copy of the foregoing Registrant's Motion to Dismiss has been duly served by sending such copy by first class mail, postage prepaid, to counsel for Petitioner, Cynthia R. Adwere, Law Office of Cynthia R. Adwere, 2625 Middlefield Road #360, Palo Alto, CA 94306.

/Daniel P. Hope/
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